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No. 91-1467

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

R.G. BORG, Warden,

Petitioner,

v.

MELVIN MIKES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In determining whether to grant a petition for writ of habeas corpus by a person in custody pursuant to the judgment of a state court, should a federal court give deference to the state court's application of law to the specific factors of the habeas petitioner's case or should it review the state court's determination de novo?

2. May a federal court grant collateral relief merely because it disagrees with the good faith reasonable decision of the state court?

3. Did the Ninth Circuit Court of Appeals improperly grant habeas corpus relief, in violation of the "new rule" doctrine of Teague v. Lane, 489 U.S. 288 (1989), when it held that the evidence of the state defendant's fingerprints on the murder weapon found at the crime scene was inadequate to support his conviction because there was no additional evidence affirmatively showing that the weapon had been inaccessible to him earlier during a time when he might have innocently handled it?

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TABLE OF CONTENTS

	Page
RESPONDENT'S BRIEF IN OPPOSITION	
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
1. The Ruling Petitioner Seeks From This Court Regarding the Standard of Review in Habeas Cases Would Require This Court to Violate Principles of Separation of Powers and Stare Decisis	2
2. Petitioner Did Not Raise a Teague Claim Below. Furthermore No "New Rule" of Law Was Established in the Opinion Below	8
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page
Amadeo v. Zant, 486 U.S. 214 (1988)	9
Borum v. United States, 380 F.2d 595 (D.C. Cir. 1967).	12
Brown v. Allen, 344 U.S. 443 (1953)	3, 4
Butler v. McKellar, 494 U.S. 407 (1990)	7
Collins v. Youngblood, 110 S.Ct. 2715 (1990)	9
Duignan v. United States, 274 U.S. 195 (1927)	9
Estelle v. McGuire, 112 S. Ct. 475 (1991)	6, 7
Fay v. Noia, 372 U.S. 391 (1963)	5
Granberry v. Greer, 481 U.S. 129 (1987)	9
Hilton v. South Carolina Public Railways Commission, 112 S.Ct. 560 (1991)	7
Jackson v. Virginia, 443 U.S. 307 (1979)	2
Lewis v. Jeffers, 110 S.Ct. 3092 (1990)	7
Miller v. Fenton, 474 U.S. 104 (1985)	6
Saffle v. Parks, 494 U.S. 484 (1990)	7
Sanders v. United States, 373 U.S. 1 (1963)	5, 9

TABLE OF AUTHORITIES (CONT'D)

Cases	Page
Sumner v. Mata, 449 U.S. 539 (1981)	7
TVA v. Hill, 437 U.S. 153 (1978)	6
Teague v. Lane, 489 U.S. 288 (1989)	1, 7, 8, 11
Townsend v. Sain, 372 U.S. 293 (1963)	5
United States v. Collon, 426 F.2d 939 (6th Cir. 1970)	12
United States v. Fossen, 460 F.2d 38 (4th Cir. 1972)	11, 12
United States v. Lonsdale, 577 F.2d 923 (5th Cir. 1978)	11, 12
United States v. Scott, 452 F.2d 660 (9th Cir. 1971)	12
United States v. Talbert, 710 F.2d 528 (9th Cir. 1983)	11, 12
Youakim v. Miller, 425 U.S. 231 (1976)	9
Statutes	
U.S.C. § 2254(a)	5
§ 2254(d)	5
Constitutions	
U.S. Const., art. III, § 1	3
Texts and Others	
H.R. 5649, H.R. Rep. No. 1200, 84th Cong., 1st Sess. (April 11, 1955)	4
Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50 (1956)	4

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STATEMENT OF THE CASE

Respondent incorporates by reference the statement of facts as outlined in the Ninth Circuit's opinion below.

In addition, petitioner filed his Return to Petition for Writ of Habeas Corpus in the Central District Court on March 20, 1989 and his Appellee's Brief in the

Ninth Circuit on June 26, 1990. In neither pleading was a Teague claim raised.

REASONS FOR DENYING THE WRIT

1. The Ruling Petitioner Seeks From This Court Regarding the Standard of Review in Habeas Cases Would Require This Court to Violate Principles of Separation of Powers and Stare Decisis

The facts of this case were undisputed. The only evidence of guilt were respondent's fingerprints on the post believed to be the murder weapon. Other fingerprints were also on that post, fingerprints which were capable of identification, but were not respondent's. Respondent did not testify. Respondent raised the federal constitutional issue of sufficiency of evidence under Jackson v. Virginia, 443 U.S. 307 (1979). Because the facts were undisputed, the state court's analysis of the sufficiency issue required only an application of the federal law of sufficiency to the facts of the case. The Ninth Circuit applied the Jackson standard and, relying on longstanding federal authority, reversed the state court's decision.

Petitioner does not contend that the Ninth Circuit improperly exercised its authority in reaching its decision. Rather, petitioner is asking this court to change the de novo standard of review of federal constitutional questions on habeas corpus. In its stead, petitioner promotes a standard which would require the federal court to accord

deference to a state court's application of federal law in the same manner it is required to accord a presumption of correctness to the state court's finding of facts. (Petn., p. 14.) Such a ruling by this Court would foreclose federal court jurisdiction over federal constitutional issues where only Congress has the authority to delineate the jurisdiction of the federal courts in habeas corpus cases, thereby violating the doctrine of separation of powers. Furthermore, it would be contrary to a line of cases dating back decades which have interpreted the habeas statute require a de novo standard of review.

Under article III, section 1 of the Constitution, it is Congress that is vested with the power to confer federal jurisdiction. In interpreting the habeas statute, this Court in Brown v. Allen, 344 U.S. 443 (1953) made explicit that in reviewing federal constitutional issues on habeas a de novo standard of review was required. Justice Frankfurter, writing a second opinion for the Court, explained that:

> State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide. . . .
>
> Where the ascertainment of the historical facts does not dispose of the claim but calls for

interpretation of the legal significance of such facts . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so called-mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge. (Id. at pp. 506-507.)

The Court recognized that the principle of separation-of-powers would be violated if the Court circumscribed that jurisdiction:

> It is not for us to determine whether this power should have been vested in the federal courts. . . . [T]he wisdom of . . . a modification in the law is for Congress to consider . . . . (Id. at pp. 499-500.)
>
> All that has gone before is not to be ignored as irrelevant. But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have . . . . (Id. at p. 500.)

After Brown, Congress considered numerous plans to revise habeas corpus to require the federal courts to defer to the state courts' decision on federal claims. E.g. H.R. 5649, H.R. Rep. No. 1200, 84th Cong., 1st Sess. (April 11,

1955), discussed in Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50 (1956). No such plan, however, was passed, and this Court continued to confirm the holding in Brown that the federal courts are not to defer to previous state court application of federal law to particular facts. Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Sanders v. United States, 373 U.S. 1 (1963).

In 1966, Congress did act in the area of habeas corpus. For purposes of this discussion, there were two significant changes. The first was to add subsection 2254(a) which reads:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

On its face, this new statute confirmed the federal courts' obligation to receive petitions from state prisoners to review for federal error and to correct those errors, particularly since it was enacted only three years after Noia, Townsend, and Sanders. The second change was to add section 2254(d) which requires the federal court to defer to

state courts' findings of fact. Had Congress intended the federal courts to defer to state courts' application of law as well as findings of fact, it would have said so.

Congress' failure to act on the issue of the standard of review should not be deemed an invitation to this Court to act. The jurisdiction of the federal courts is purely a matter of statute which is within the power of Congress to determine. This Court has been mindful of the separation of powers doctrine in other contexts:

> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.' Our constitution vests such responsibilities in the political branches.

TVA v. Hill, 437 U.S. 153, 195 (1978). So too in this case should the court respect the political judgment reached by the legislative branch and leave it to the wisdom of Congress to alter the standard of review on habeas.

In addition to the doctrine of separation of powers, the principle of stare decisis compels this Court to continue to use the de novo standard of review. Since 1966, this Court has continued to employ a de novo review standard to state courts' application of federal law. Estelle v. McGuire, 112 S. Ct. 475 (1991); Miller v. Fenton, 474 U.S.

104 (1985); Sumner v. Mata, 449 U.S. 539 (1981). Considerations of stare decisis are particularly important in cases where this Court has given a federal statute an authoritative interpretation, and Congress has had ample time to reject that interpretation. Hilton v. South Carolina Public Railways Commission, 112 S.Ct. 560, 564 (1991).

Petitioner asserts that this Court's recent opinions in the area of habeas, Teague v. Lane, 489 U.S. 288 (1989), Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990), strongly suggest that the federal courts must defer to the state courts' application of law to facts. (Petn., p. 11.) These cases, however, do not address the plenary nature of review by the federal courts, but only the scope of cases which can be reviewed on habeas. The Teague line of cases establish that new rules of constitutional law announced after a conviction becomes final should not be applied by federal courts in habeas proceedings. Whether the habeas petitioner is seeking relief under a new rule is a threshold question decided before the federal court reviews the merits of the claim. If there is no new rule, then review is de novo. In post-Teague cases, Lewis v. Jeffers, 110 S.Ct. 3092, 3102-3104 (1990) and Estelle v. McGuire, 112 S. Ct. 475, 481-482, this Court has applied a de novo standard of review to mixed questions of fact and law.

This Court should not grant certiorari on the issue of the standard of review for several reasons. First, it is for Congress to designate the jurisdiction of the federal courts, and action by this Court would violate the doctrine of separation of powers. Second, this Court's longstanding interpretation of the habeas statute as requiring de novo review should be adhered to under principles of stare decisis. Last, this court's recent decisions do not indicate a change in the standard of review in habeas cases is warranted. Certiorari should be denied.

2. Petitioner Did Not Raise a Teague Claim Below. Furthermore No "New Rule" of Law Was Established in the Opinion Below

Petitioner seeks a grant of certiorari on a Teague issue which he failed to raise below. Petitioner filed his Return to Petition for Writ of Habeas Corpus in the District Court on March 16, 1989, and his Appellee's Brief in the Ninth Circuit on June 26, 1990, both after the date of Teague v. Lane, 489 U.S. 288 (1989). Although respondent's claim has been the same throughout state and federal court -- that the evidence was insufficient to sustain the conviction -- petitioner did not raise a Teague claim in either pleading. As a result, neither the Magistrate's Findings in the District Court, nor the Ninth Circuit opinion discuss Teague. Instead, both courts resolved the case on Jackson v. Virginia grounds. It was not until

petitioner lost in the Ninth Circuit that he raised a Teague claim in his Petition for Rehearing.

This court should not grant certiorari on the Teague issue where petitioner failed to raise the issue below, and as a result respondent did not have the opportunity to address the issue below and neither court below considered the issue. "It is only in exceptional cases . . . that questions not pressed or passed upon below are reviewed." Duignan v. United States, 274 U.S. 195, 200 (1927); Youakim v. Miller, 425 U.S. 231, 243 (1976). If a Teague claim exists in this case, it is not extraordinary and was waived by petitioner when he failed to raise the issue before rehearing.

The Teague defense of nonretroactivity is not jurisdictional and, thus, the burden of raising the defense was on petitioner and not on the federal courts sua sponte. Collins v. Youngblood, 110 S.Ct. 2715, 2718 (1990). That the burden is allocated in this manner is consistent with the general rule that allocates to the responding party the burden of pleading habeas corpus defenses. See e.g., Amadeo v. Zant, 486 U.S. 214, 228, fn. 6. (1988) (procedural default defense); Granberry v. Greer, 481 U.S. 129 (1987) (non exhaustion defense); Sanders v. United States, 373 U.S. 1, 10 (1963) (abuse of writ bar). Moreover, the reliance- and finality-based interests that the Teague nonretroactivity defense serves belongs to the state, hence

it should be the state's responsibility to assert that defense. Because petitioner did not raise this defense before, he should not now be heard on this issue before this Court.

Furthermore, no "new rule" was established in this case, and thus, Teague is not applicable. Petitioner argues that the court of appeals below created a new Jackson v. Virginia sufficiency of evidence standard by requiring the prosecution to not only produce evidence from which a rational juror could find the essential elements of a crime beyond a reasonable doubt, but to also produce evidence which affirmatively negates exculpatory inferences that might be drawn from the evidence. (Petn., p. 15.) The court of appeals did not so hold. Indeed, the court expressly rejected this "holding" which petitioner argues it embraced when it recognized that the prosecution is not obligated to "exclude all inferences or reasonable hypotheses consistent with innocence." (Petn., Appen. A [slip opn., p. 13998].) What the court did hold is that the Jackson v. Virginia standard is not met in a fingerprints-only case where the prosecution case is based on the premise that the defendant placed his fingerprints on the incriminating object at the time of the crime, but the prosecution fails to present evidence from which the jury could reasonable infer that the prints were placed on the

object at the time of the crime. (Petn., Appen. A [slip opn., p. 13998].)

That holding established no new rule under Teague. A case announces a new rule "only where the rule breaks new ground or imposes new obligations on the States or the Federal Government." Teague v. Lane, 489 U.S. 288, 301 (1989). There is nothing new in the court of appeals treatment of the Jackson v. Virginia standard. The gloss which petitioner argues the court added to the Jackson standard was repudiated by the court; no such expansion of the Jackson standard was announced in the opinion below. Instead, the court simply set forth the Jackson standard and applied it to the undisputed facts of the case. Petitioner's real quarrel is not with the court's treatment of the Jackson standard, but with the de novo standard of review and the court's conclusion that the fingerprint evidence in this case did not constitute sufficient evidence. There is, however, nothing new in the court's application of the Jackson standard to the facts of this case.

The court's holding regarding what constitutes sufficient evidence in a fingerprints-only case merely reiterated what that court and other circuits had previously held. United States v. Talbert, 710 F.2d 528 (9th Cir. 1983); United States v. Lonsdale, 577 F.2d 923 (5th Cir. 1978); United States v. Fossen, 460 F.2d 38 (4th Cir. 1972);

Borum v. United States, 380 F.2d 595 (D.C. Cir. 1967). (Petn., Appen. A [slip opn., p. 13997].) In reaching its conclusion that the facts of this case did not establish sufficient evidence, the court relied on factually similar cases which also found insufficient evidence. United States v. Lonsdale, 577 F.2d 923, United States v. Van Fossen, 460 F.2d 38; United States v. Collon, 426 F.2d 939 (6th Cir. 1970); Borum v. United States, 380 F.2d 595. (Petn., Appen. A [slip opn., pp. 14004-14006].) Those cases represented opinions from numerous circuits dating as far back as 1967. That petitioner's complaint is with the outcome of the case and not the court's "expansion" of the Jackson standard is evidenced by petitioner's contention that the facts of this case were more similar to those in United States v. Talbert, 710 F.2d 528 (9th Cir. 1983) and United States v. Scott, 452 F.2d 660 (9th Cir. 1971), instead of the cases relied on by the court. (Petn., p. 18.) Those cases, however, are factually distinguishable, and the court of appeals fully and carefully discussed those distinctions in its opinion. (Petn., Appen. A [slip op., pp. 14002-14003].

There is no Teague issue to resolve in this case. The court of appeals did not change the Jackson v. Virginia sufficiency of evidence standard in its opinion. The court simply looked at the undisputed facts of this case and, relying on established case law, determined that the facts

of this case did not satisfy the Jackson standard. The writ of certiorari should be denied.

* * * * * *

CONCLUSION

For the foregoing reasons, respondent Mikes requests that the writ of certiorari be denied.

DATED: May 20, 1992

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JILL ISHIDA, a member of the Bar of this Court, hereby certify that on May 20, 1992, a copy of the Motion to Proceed In Forma Pauperis and Respondent's Brief in Opposition in the above-entitled case were mailed, first-class postage prepaid, to counsel for petitioner:

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I further certify that all parties required to be served have been served.

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